No. 11311

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

RAILWAY MAIL ASSOCIATION, a corporation,
Appellant,

vs.

JENNIE M. BABBITT, *Appellee.*

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

BRIEF OF APPELLEE

LUNDIN & BARTO,
ANTHONY SAVAGE,
Attorneys for Appellee.

955 Dexter Horton Building,
Seattle 4, Washington.

THE ARGUS PRESS, SEATTLE

No. 11311

IN THE
UNITED STATES
CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

RAILWAY MAIL ASSOCIATION, a corporation,
Appellant,

vs.

JENNIE M. BABBITT, *Appellee.*

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

BRIEF OF APPELLEE

LUNDIN & BARTO,
ANTHONY SAVAGE,
Attorneys for Appellee.

955 Dexter Horton Building,
Seattle 4, Washington.

THE ARGUS PRESS, SEATTLE

INDEX

TABLE OF CASES

TEXTBOOKS

STATUTES

RULES

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

RAILWAY MAIL ASSOCIATION, a corporation, *Appellant*, vs. JENNIE M. BABBITT, *Appellee*.	No. 11311

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

BRIEF OF APPELLEE

STATEMENT OF PLEADINGS AND FACTS DISCLOSING JURISDICTION OF THE DISTRICT COURT AND THIS COURT

Jennie M. Babbitt, as plaintiff, filed in the Superior Court of the State of Washington for King County, a complaint against Railway Mail Association (Tr. 2). Alleging diversity of citizenship and that the amount involved was more than $3000, the defendant, Railway Mail Association filed in the Superior Court of the State of Washington for King County, its petition for removal, and pursuant to such petition the cause was removed to the United States District Court for the Western District of Washington, Northern Division (R. 6, R. 9). The juris-

diction of the District Court was based on 28 U.S.C.A. 71 and 72. The cause was tried before a jury which returned a verdict in favor of the plaintiff and judgment was entered in favor of the plaintiff and against the defendant pursuant to said verdict. Appeal was taken to this Court which has jurisdiction upon appeal to review such judgment. 28 U.S.C.A. 255.

INTRODUCTION

The Rules of the United States Circuit Court of Appeals for the Ninth Circuit, 20, p.2(c) provide: The appellant's brief should contain a concise abstract or statement of the case, presenting succinctly the questions involved and the manner in which they are raised. The appellant's purported statement of facts does violence to this rule. Rather than being a concise statement of the case, presenting the questions involved and the manner in which they were raised, it is a singular jumble of fact, argument and fiction. It is replete with excursions outside the record, flights of fancy, contradictions, and at times it even descends to pettiness. Straw men are set up and demolished with gusto; pleadings which were stricken are resurrected and made the basis of so-called judicial admissions; evidence, which is in one breath denounced as incompetent, is later solemnly advanced as proof of the appellant's contentions. New specifications, previously undesignated, spring forth in full panoply arrayed. Specifications 2, 3, 4 and 5 are not set out in the Statement of Points upon which the appellant relies. Since such specifications were not designated for

inclusion in the record on appeal, and since the appellant did not designate the complete record and all proceedings and evidence in the action, the purpose of Rule 75(d) Rules of Civil Procedure—assurance that the matter brought up in the record on appeal is adequate to protect the interests of the appellee, was circumvented. *Keeley v. Mutual Life Insurance Co. of New York*, 113 F.2d 633. Without the gift of prophecy the appellee could not anticipate with any degree of accuracy what new issue might be raised and so insist upon inclusion of matters which would enable the appellate court to determine the question with understanding.

STATEMENT OF THE CASE

Jennie M. Babbit, the surviving spouse of Fred I. Babbitt, instituted an action against the Railway Mail Corporation to recover the sum of $4000.00 due her as the beneficiary of an accident insurance policy issued to her husband by the defendant corporation. The beneficiary certificate provided that if the named member should suffer death during the continuance of the certificate through external, violent and accidental means not the results of his own vicious, intemperate or unlawful conduct, the Association should pay to the wife $4000.00. There was to be no liability when disease, defects or bodily injury was a cause of death (R. 3, 12). Death within the meaning of the certificate was pleaded.

The defendant admitted the issuance, for a valuable consideration: of a beneficiary certificate to Fred I.

Babbitt on February 1st, 1924 (R. 10). The defendant further admitted that the insured paid regularly all the dues and assessments to the time of his death and that he was a member in good standing (R. 35, 51, 96, 125). The affirmative defense—the only one relied upon—pleaded that death was not the sole result of accidental means alone, that disease, defects or bodily infirmity was the cause or a contributing cause (R. 14).

The plaintiff offered evidence to prove that on July 9th, 1943, the insured, who had been retired for years from active service because of multiple sclerosis, suffered an accidental fall in the act of dressing when a loose corner of a small scatter rug upon which he was standing slipped out from under his feet as he twisted his body (R. 53, 54, 92); that the accidental fall caused a fracture of the left femur; that a fat embolus was thrown into the blood stream from the fractured bone; that the embolus was circulated to the lungs and brain and so caused death (R. 77, 78, 79, 99, 100, 107, 109, 110, 111, 119, 120, 121, 122) and further that no disease or bodily defect was a contributing cause (R. 77, 79, 111).

The defendant sought to prove that disease or bodily defect, multiple sclerosis, or transverse myelitis, or arteriosclerosis, was a contributing cause of death.

The jury returned a verdict in the plaintiff's favor; an alternative motion for judgment or new trial was denied; a judgment entered upon the verdict and thereafter this appeal taken (R. 18, 19, 20).

Prior to the institution of the action, the plaintiff, as was required by the constitution and by-laws of the Association, filed her proof of claim upon the forms of the defendant. Her claim was disallowed by the Committee of Claims. An appeal was taken to the National Executive Committee and on October 21, 1943, her appeal was denied (R. 5, 6, 11, 94, 95).

ARGUMENT

Specification 1

Much ado is made over the trial court's allowing amendments to be made to the complaint just as the trial started. A complete answer to the argument is contained in the language of the Rules of Civil Procedure which are designed to cover situations of the kind which arose here and which constantly come up in law suits. Rule 15(a) states, "otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; *and leave shall be freely given when justice so requires.*" Rule 15(b) goes so far as to say, "the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action shall be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence."

Briefly, and simply, the complaint was amended

by striking paragraphs IV and VI (R. 46, 47); and then the cause proceeded as a law action to be decided by a jury. With the greatest consideration, the trial court asked the appellant's counsel if they would be handicapped or prejudiced in going to trial on the amended complaint (R. 42, 47, 48). After all of the preliminary discussion and the allowance of the amendments the trial judge stated, "And I want to offer to the defendant again, the opportunity, if he sees fit to do so to claim surprise by reason of a narrowing of the issues." Mr. Jarvis replied, "Well, I will say this your Honor, that we are not surprised * * *." "I will say, your Honor, we are ready to try this case—perfectly ready to try it * * *." "I do not believe that there is a great deal that would justify us in asking, your Honor, conscientiously asking, your Honor, for a continuance" (R. 47, 48).

After having had so declared himself, we are now confronted with a complete reversal of attitude. Grievance and injury are affected because no new written complaint was filed (none was requested); because the amendments were oral, as if the granting of a trial amendment of necessity called for the filing of a new written pleading. It must be remembered that nothing new was added; that there was merely a taking away, a shortening and simplifying of the complaint by striking therefrom bodily two paragraphs. The proceedings were clear at the time and still are. In his instructions to the jury, the Court was careful to define and limit the plaintiff's cause of action as amended. No one could have been mislead or preju-

diced, except defense counsel, and then only for the purpose of appeal.

Typical of the appellant's attitude is the contention, which now rears its head for the first time, that the defendant (plaintiff) was not a member of the Railway Mail Service at the time of his accident and death within the meaning of the constitution and by-laws of the organization because he was no longer working in the Railway Mail Service. If this argument is not advanced with tongue in cheek, many large portions of the record have been forgotten.

The defendant's answer admits the allegations of Paragraph V of the plaintiff's complaint—that the insured did pay to the defendant all the regular monthly dues and special assessments from July 31, 1928, until the date of his death on July 30, 1943 (R. 10).

The affirmative defenses nowhere plead that the insured was no longer eligible to the benefits of his certificate by reason of his retirement from active service (R. 12, 13 and 14).

The trial court was concerned about this phase of the case, and asked defense counsel if the permanent retirement of the insured, if the information had been passed on to the insurer, the defendant, severed the plaintiff automatically under the terms of the contract. In order to make assurance doubly sure the question was asked twice. Mr. Jarvis, who handled the whole trial for the defendant, answered, "No, sir, it did not" (R. 34, 35). That was a real judicial admis-

sion made in open court by the defendant's counsel and therefore binding upon it. Moreover, it settled that particular question so that it was not an issue in the trial. Without doubt all parties so understood it, and the court's conviction respecting the matter is established by an instruction as follows:

> "The defendant—that is, the Railway Mail Association, admits that there was such a certificate and that it was in full force and effect on July the 30, 1943, date when Fred I. Babbitt died." (R. 127)

To that instruction no exception was taken.

Mr. Guernsey K. Chaplin, president of the local branch of the Railway Mail Association and by virtue of his office, a member of the Association's National Board, testified there was no reduction of the insured's dues and assessments by reason of his retirement, and that he was a full member (R. 96). To the same effect is the testimony of Herbert J. Matthews, the local financial secretary, the man who collected the dues and assessments (R. 125). The claim was considered and decided by the National organization as being one of a member in good standing, and was rejected solely on the ground that death was not occasioned by accident alone. Obviously the appellant's local officers, its National Board and its trial counsel, all considered Mr. Babbitt a member in good standing until after the jury verdict. Then came this afterthought, newly-born, in time for appeal.

Conceding, arguendo, that the question is properly before this court, we point out that the language

of the constitution states that the insurance benefits were not available to persons who had resigned, been removed or transferred from the Railway Mail Association. The language being that of the insurer, undoubtedly framed for its protection, must be strictly construed against the Association. Nowhere is there any provision stating that *retirement* called for severance from the benefits of the organization. There is no need to point out to any judge the distinction between resignation and retirement. Mr. Babbitt never resigned, was never removed, was never transferred from the Railway Mail Association. He retired solely because of ill health. At the time no one knew how long his disability would endure. In the event of recovery he would have undoubtedly, resumed his former calling.

Still other authority must resolve this question in the plaintiff's favor. For at least twelve years the defendant company accepted the regular dues and special assessments from the insured in full amount and on the basis of full membership with all its attendant rights, benefits and obligations, with full knowledge of his physical condition and disability. The cases are uniform in holding that even if a disability is sufficient to effect a forfeiture, collection and retention of the dues waive the right to declare forfeiture. *McDonell v. Local Union No. 81*, 111 Wash. 147; *Ware v. Grand Lodge Bro. of R.R. Trainmen*, 152 Wash. 78. An insurer who with knowledge of facts entitling it to treat as a policy as no longer in force receives and accepts a premium on the policy

is estopped to take advantage of the forfeiture. 29 Amer. Jurisprudence, Par. 857 and 863.

In addition to all the above, it may be noted, in passing, that Rule 12(h) of the Rules of Civil Procedure provides that a party waives all defenses which he does not present either by motion or in his answer —with certain exceptions. The matter for which the defendant is now contending was not set out as a defense either by motion or in any of his pleadings.

The appellant leans on a very slender reed in his argument based upon the plaintiff's reply. In the first place the reply was stricken on his motion (R. 24); now he seeks to base a so-called judicial admission upon the very pleading he had succeeded in eliminating. It is elementary that a stricken pleading cannot, without anything further, be considered a judicial admission. However, there could be no possible prejudice. The plaintiff at all times admitted and testified that the insured had been afflicted with multiple sclerosis to the extent of being unable to perform his duties as Railway mail clerk. And as was pointed out by the trial judge (R. 38) there was no admission in the reply that disease or bodily infirmity was a contributing cause of death, but only a statement that the defendant association was obligated to pay on the beneficiary certificate even though disease or defect *might* have been a contributing cause of death.

Specification 2

A considerable portion of the argument respecting the jury trial is based on a false premise. Time and

again the appellant states that the demand for jury trial was stricken and that Judge Black ordered that a jury be impaneled to act in an advisory capacity only (Brief 14, 18). We say there was no such order. On the contrary Judge Black impaneled a jury to hear such issues of fact as might arise in the trial and as the Court might direct to be decided by the jury *and* to act in an advisory capacity in connection with such issues of fact as the court *might* refer to them for that purpose.

If Judge Black had presided at the trial, even under the language of this order, he could have submitted the issues of fact for the jury's sole determination. The power and authority of Judge Leavy could not have been less than that of Judge Black who assigned the case to Judge Leavy for trial.

However, counsel has confused two principles or rules—that of jury trial of right and jury trial by permission in the exercise of discretion. Conceding for the sake of argument that we had no right to demand a jury trial because of failure to demand within the time fixed, yet it is as clear as a church by daylight that Rule 39(b) of the Civil Rules of Practice says, notwithstanding the failure of a party to demand a jury in an action in which such demand might have been made of right, the court in its discretion upon motion may order a trial by a jury of any or all issues. The trial judge so held (R. 45, 46).

Specification 3

What the appellant seeks to make a question of law was a question of fact for the jury's exclusive

decision. Was the death of the insured caused by accident, resulting directly and independently and exclusively of any other cause, without disease, defect or bodily infirmity being a contributing cause (R. 54, 81). With respect to the question of accident, we have the uncontradicted testimony of Mrs. Babbitt that the insured slipped and fell heavily to the floor as the result of a loose corner of a rug sliding as he turned or twisted his body to put on long underwear (R. 54, 81). But the testimony of an eye-witness is not necessary to establish accidental death. As this court has said in *United States F. & G. v. Blum,* 270 Fed. 947, accidental death can be established by circumstantial evidence. Accidental slips and falls in the home on stairways, in bathtubs, on polished floors and loose rugs are so common that insurance companies in their advertising are literally holding up stop and look signs, warning of potential dangers.

The appellee's discussion of voluntary and involuntary action, and the distinction between them, is too nebulous to grasp. Without doubt, every accident is preceded by some voluntary action. One must tread stairs before he can slip thereon. One must subject himself to a bath before there can be a skid in the tub. One must voluntarily step on a rug before it can slip out from under him. Speculation as to what might have caused the fall may be an interesting mental exercise; but it is idle because the jury found on competent, substantial testimony, which they undoubtedly believed, that it was occasioned by an accident.

There can be no doubt that the fall caused a fractured femur and that, in turn, an embolus, naturally, proximately and without the intervention of any independent cause; that such embolus got into the blood stream, was circulated to the lungs and to the brain and caused death. The attending physician, who reduced the fracture, who attended the insured regularly in the hospital, the family doctor for years, testified positively that the fall caused the fracture, the fracture caused the embolus, and the embolus resulted in death (R. 76, 77, 78). Transverse myelitis was in no sense a contributing factor (R. 99, 100). To the same effect was the testimony of Dr. Conrad Jacobsen, an expert called by the plaintiff (R. 106, 107, 111).

But in addition to these two medical men we have the testimony of the defendant's own doctor, Alfred Balle, and the autopsy report signed by him. This evidence alone is sufficient to justify submission of the case to the jury. The autopsy report (Defendant's Exhibit A-1) reads in part—"Anatomic diagnosis: 1. Fracture of the left femur. 2. Hemorrhagic infarct of both lungs. Extensive infraction of the pons overlying the ventricles with areas of necrosis and slight hemorrhage. 3. Generalized marked arterial sclerosis. 4. Marked edema of the brain. 5. Marked arterio sclerotic nephritis." On cross-examination the defendant's expert testified: The hemorrhagic infract of both lungs was extensive enough so that it could have caused death (R. 119); embolus in the blood stream which lodged in the lungs could have caused this in-

farct; there was an extensive infarction of the pons overlying the ventricles with areas of necrosis and slight hemorrhage; extensive infarction was sufficient to cause death; the extensive infarction of the pons could have been caused by an embolus (R. 120). A fracture of a bone is the most common cause of fat embolus. Fracture of a bone could result in an embolus. A fat embolus may go to the lungs and to the brain. When an embolus of sufficient size goes to the lungs or the brain or both, it will result in death by reason of an infarct (R. 122).

There is not a shred of testimony, even from the appellant's own expert that multiple sclerosis, or transverse myelitis or any other disease contributed to the insured's death.

The appellant adopts the position that one must be free from any bodily defect or disease before he can recover for accidental death. He can find no support in reason or authority. Although our own state books are richly studded with decisions exactly in point, counsel has not seen fit to refer to or quote from any of them. Perhaps the leading case in this Circuit is *Order of Commercial Travelers v. Groves*, 130 F.2d 863, a case from our own district, and one which is undoubtedly decisive of this cause. Upon that decision and the authorities cited therein, we can rest our case because the two are nearly identical.

The *Groves* case cites *Hill v. Great Northern Life Insurance Co.*, 186 Wash. 617. There the insured fell dead shortly after an automobile accident. The de-

fendant company argued that death was caused or contributed to by a pre-existing coronary condition. Shortly before, the insured had been examined by a physician who found that he was suffering from low blood pressure, probable coronary pathology, a peptic ulcer and a definite mitral heart murmur. An instruction that the question whether the death was due solely to accident was for the jury to determine and a verdict for the plaintiff was upheld. To the same effect are *Pierce v. Pacific M.L. Ins. of Cal.*, 7 Wn.(2d) 151, where the insured had previously suffered a stroke of apoplexy; *Kane v. Order of Commercial Travelers*, 3 Wn.(2d) 355, in which case under an accident insurance certificate the question whether death from pneumonia was an accidental one upon a showing that the insured had been injured from an accidental fall which aggravated an existing hernia and necessitated a surgical operation at which time he contracted pneumonia, causing his death, was properly submitted to a jury, their finding in favor of the plaintiff was upheld.

Our courts, in harmony the overwhelming weight of authority, have held that a sick man may suffer an accident, which but for his sickness might not have befallen him; and if the disease, while existing, be but a condition and the accident the moving and proximate cause of death, the exception in the policy will not relieve the insurer. *United States F. & G. v. Blum*, 270 Fed. 947; *Flyzik v. Travelers Insurance Co.*, 20 Wn.(2d) 35; *Lynch v. Northern Life*, 22 Wn. (2d) 913.

A very interesting and instructive decision was written by former Chief Justice Taft while he was still on the bench of the Circuit Court of Appeals in the *Manufacturers Accident Indemnity Co. v. Dorgan*, 58 Fed. 945. This opinion was later quoted with approval by the Washington state court. The insured, while on a fishing trip early one morning experienced difficulty with his throat and chest. Shortly after he went out to fish, he was discovered lying in a brook, face downward and submerged in six inches of water, dead, with bruise on his forehead, yellowish froth about his mouth, face purple and tongue inflamed. The autopsy showed heart, brain and other vital organs in normal and healthy condition. Insurer introduced evidence tending to show D had suffered from defective action of the heart at its aortic valve; also, some evidence tending to show D had suffered from dizziness caused by defective action of the heart.

The policy contained a provision to the effect that it would not cover accidental injuries or death resulting from or caused, directly or indirectly wholly or in part, by or in consequence of vertigo or any disease existing prior or subsequent to the date of the certificate.

The court held that the burden of proving accidental death was upon the plaintiff. The circumstances surrounding his death were consistent with the theory that the deceased had slipped and fallen in such a way as to strike his head against a rock, in which helpless state, suffocation by drowning followed:

"It is well settled that an involuntary death by

drowning is a death by external, violent and accidental means. In the legal sense, and within the meaning of the terms of the policy, if one suffered death by drowning, no matter what was the cause of his falling into the water, whether disease or slipping, the drowning in such a case would be the proximate and sole cause of the disability or death, unless it appeared that death would have been the result, even had there been no water at hand to fall into. The disease would be the condition; the drowning would be the moving, sole and proximate cause."

Specification 4

The appellant's brief presents an amazing volte face respecting appellee's Ex. 4. Moreover, there are lapses into oblivion difficult of comprehension. The burden of the appellant's plea is that the hospital records were under Washington law, incompetent and inadmissable, quoting from *Toole v. Franklin*, 158 Wash. 696, as authority. He failed to mention a later Washington case, *Murgatroyd v. Dudley*, 184 Wash. 222, which held that hospital records kept in the ordinary course of the hospital's business came within the exception of the hearsay rule and were properly admissible. There, as in this case, the hospital records were identified by the manager of the hospital who testified, as here, that they constituted all of the records of the decedent's case and that they were kept in the usual and record course of the hospital business. *Murgatroyd v. Dudley* had been pointed out to the defendant below in a brief written by the plaintiff and the trial court had dwelt on it at length in its

memorandum opinion denying a new trial. See also the note in 120 A.L.R. 1124.

On page 4 of his brief the appellant quotes language from the appellee's Ex. 4 as competent evidence in support of his contention that the insured suffered paralysis of his right leg. He does the same thing on pages 9 and 26. Can the appellant urge incompetent matter in support of his argument? But on page 29, Janus-like, the appellant looks in the opposite direction and declares the very exhibit which he cited to suit his purpose, is incompetent and therefore inadmissible. What then? Is the exhibit gospel when the appellant desires its use to support his contention and anathema when the appellee urges its proper admissibility? Will the appellant take one position or the other? He cannot cling to both horns of his dilemma.

On page 30 the court is told that the exhibit was a folder containing a collection of papers of which the defendant did not know the number, the nature, or the source of these *purported* hospital records; that it was an unexplained and identified mass of technical and medical terms, phraseology and records. But when we turn to page 9 of the brief, mirabile dictu, the appellant describes Exhibit 4 as a "cardboard folder containing four X-ray pictures and at least ten other records which Mr. Frank Fells, the business manager of the Seattle General Hospital brought into court, describing as X-ray and clinical reports pertaining to the insured." As a matter of fact, Dr. Rex Palmer is

quoted verbatim from that exhibit. It would put too great a strain on credulity to believe that counsel was unfamiliar with their contents or their authorship especially when on page 39 of his brief, he declares the hospital records were prepared by Dr. Palmer or his son.

Complaint is made that there was no opportunity for examination (although obviously careful examination was made) and no opportunity to use the records for cross-examination. Of course, when the records were once marked for identification they were in the custody of the clerk for anyone's scrutiny.

Obviously the hospital records contained no new matter. There can be no dispute respecting the reason for hospitalization, a fractured femur, the treatment used, the history of Babbitt's stay, his sudden relapse or death, or of his previous affliction. The defendant's own doctor found a fracture, infarction of lungs and brain, arterio scelrosis, certainly death. In what conceivable manner could hospital records to the same effect operate to the defendant's prejudice?

Specification 4(b)

It is contended that prejudicial error was committed by admitting in evidence a photograph of the deceased taken some twelve years prior to his death (Ex. 5). This photograph had some relevency as to the issues raised, since the undisputed evidence was that at the time it was taken and for at least five or six years prior thereto the deceased was suffering from the disease which the defendant contended was a con-

tributing cause of his death, and therefore it was properly admitted in evidence.

Specifications 4(c) and 5

It is believed that both specifications can be considered together. Dr. Don Palmer was the family physician, personally in charge and in attendance shortly after the accident until death resulted therefrom. Dr. Conrad Jacobsen testified as an expert.

Only a small portion of Dr. Palmer's testimony is quoted in the brief. But even in that small portion he testified, without objection or motion to strike, that assuming Babbitt was suffering from multiple sclerosis or transverse myelitis and had an accidental fall, with a fracture of a femur and a terminal death due to a fat embolus going to the lung and brain, in his opinion multiple sclerosis or transverse myelitis would not be a contributing cause of death (R. 77, 78).

Prejudicial error is claimed because Dr. Don Palmer was asked hypothetical questions which did not incorporate the evidence in the case and that he was asked for an ultimate conclusion which was for the jury's decision.

Dr. Palmer was asked, in great detail, respecting his personal knowledge and treatment of the deceased; and he knew that Babbitt had suffered and was suffering from multiple sclerosis. He did state without equivocation on direct examination (R. 77, 78), on cross-examination (R. 78, 79, 98, 99) and on redirect (R. 99, 100), that death was due to an em-

bolus going to the lungs and brain from a fractured femur.

Dr. Don Palmer was called by the plaintiff soon after Babbitt's fall. He ordered an ambulance to have the decedent taken to the hospital immediately, and there procured a room for him. He personally reduced the fracture, prescribed the course of treatment, visited the decedent in the hospital, gave consent to his departure, and then saw him when he fell into a coma as a result of an embolus. Dr. Palmer went into considerable detail, giving the symptons of an embolus, and stated that it was his opinion that Fred Babbitt had died from a fat embolus, which had been caused by a fractured femur (R. 77, 79, 99). It would be difficult to conceive of a case with which a doctor was more closely connected, or about which he had more personal knowledge and information.

With respect to the testimony of Dr. Jacobson, hypothetical questions were put to him by the plaintiff's counsel, and upon the basis of the facts which had been established, he stated that in his opinion death was due to an embolus which had been caused by a fractured bone. The appellant urges prejudicial error because Dr. Jacobsen had seen the hospital records and had seen part of the defendant's Ex. A-1. Dr. Balle's autopsy report, and had conversed with Dr. Don Palmer.

Perhaps the easiest way to answer each and every argument made by the appellant on this point is to refer to the language of the leading case of *Hill v.*

Great Northern Life Insurance Company, 186 Wash. 167. The decedent fell dead shortly after an automobile accident. His representatives contended that death was caused, or at least contributed to, by a pre-existing coronary condition. Shortly before the decedent undertook his trip, he had been examined in the City of Seattle by a Doctor Standard, who found that he was suffering from low blood pressure, probable coronary pathology, a peptic ulcer, and a definite mitral heart murmur.

At the trial of the case the coroner, who assisted in performing the autopsy, was called to the stand. The facts concerning the decedent's death had been disclosed to him prior to the time that the autopsy was held. He was then asked what had caused the hemorrhage and he answered that he did not know. He was further asked if a shock caused by an automobile collision would cause it. His answer was, "It could cause it." The court could find no valid objection to the questions or to the answers, despite the fact that the witness had already discussed the decedent's condition as found by Dr. Standard.

The same witness was then asked what, in his opinion, caused the hemorrhage, and his answer was, "Probably form an accident."

Despite the fact that exception was taken to the question upon the ground that the witness did not have sufficient knowledge upon which to base an opinion, the court felt that it was under the circumstances proper, and the witness was competent to testify

thereto, he having been advised of the physical examination and the finding by Dr. Standard. The court went on to say. While the answer would probably not of itself be sufficient to sustain a verdict in the absence of more definite testimony, the jury was nevertheless entitled to consider it in connection with all the other evidence.

The court continued:

> "The issues in this case were of such a nature that the jury was necessarily dependent upon medical testimony in determining the cause of death. The effects upon the human system of diseases and afflictions such as were portrayed in this case are not within the sphere of common knowledge. To arrive at an intelligent understanding and decision of such matters, the testimony of witnesses possessing special knowledge and skill is required. Both parties in the case at bar recognized that fact and all the testimony as to the producing cause of death came from physicians."

It is obvious from even a most casual reading of this paragraph that the court could have been talking about the case of *Babbitt v. Railway Mail Association.*

The court continued:

> "There are, generally, two classes of cases in which expert testimony as to the facts is admissible. In one class, the facts are to be stated by expert witnesses, but the conclusions therefrom are to be drawn by the jury. In the other class, the expert witnesses not only state the facts, but also give their conclusions in the

form of opinions, which the jury may either accept or reject. The first class comprises those instances where the existence of particular facts is not of common knowledge, but is peculiarly within the knowledge of men whose experience or study enables them to speak with authority. If, with such facts before it, the jury is able to form a conclusion therefrom, it is the sole province of a jury to do so. The other class comprises those cases where not only the knowledge of the facts, but also the conclusion to be drawn therefrom is dependent upon professional and scientific knowledge or skill. In such cases, qualified experts may testify both as to the facts and as to the conclusions.

"The case before us falls within the second classification. Mr. Hill's physical condition at, and before, the time of the accident involved matters of medical diagnosis and required the medium of expert opinion, but just as important were the conclusions likewise required translation by expert knowledge."

It should be noted that three physicians testified in the Hill case, that all three of them reviewed and considered all the facts included in Dr. Standard's findings and in the report of the autopsy. We submit that there is no difference except in names, times and places between the Hill case and the Babbitt case. See also 32 C.J.S., §536.

In short, as stated by Amer. Jur. Vol. 20, par. 868, at page 732, opinions as to causation (death) may be based also upon what the witness had heard other witnesses testify to in the case, assuming that the

testimony so heard was true, or in part on examination or observation. There is, of course, no objection to the expression by a qualified physician of any opinion as to the cause of a death or of a particular physical condition, based upon wholly hypothetical questions, where the subject is one requiring superior learning or experience, and hypothetical questions fairly describe the condition of the person in question and reflect the testimony before the jury upon that point. Opinions of medical experts have been admitted also where based upon facts hypothetically stated, taken in connection with facts personally observed by the witnesses and fuly detailed to the jury.

Reference is made also to *Helland v. Bridenstine*, 55 Wash. 471, in which the court said:

> "A hypothetical question to a medical expert may embody the very fact ultimately to be found, where the inference from the facts proven involved a question of medical science on which the expert's opinion was proper."

Metsker v. Mutual Life Insurance Co., 12 Wn.(2d) 618.

The defendant was amply protected by the court's instructions with respect to expert testimony. On page 136 of the Record we find that the court charged: "An expert witness can only base an opinion on facts and records introduced in evidence, and any opinion which directly or indirectly is based upon facts or records not in evidence in the case, is not to be regarded by you."

CONCLUSION

We have carefully examined the authorities cited by the appellant. Suffice it to say that they are not in point. First, because the facts are not comparable; second, because only portions of the principle are quoted; and, third, because some of them are in sharp conflict with the decisions of the Supreme Court of the State of Washington, which decisions are the law of the forum in this state. It is submitted that there was no error below and the case should be affirmed.

Respectfully submitted,

LUNDIN & BARTO,

ANTHONY SAVAGE,

Attorneys for Appellee.